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LOON ENG SOON

v.

TAN BOON SWEE

HIGH COURT MALAYA, MALACCA

WAN YAHYA J

b

[CIVIL APPEAL NO. 7/81]

21 JANUARY 1986

LANDLORD AND TENANT: *Tenancy agreement - Arrears of rent and non-occupation - Control of Rent Act 1966 - Definition of 'fair rent'.*

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In this case, the landlord (appellant) entered into a tenancy agreement in respect of a house with the tenant (respondent) for a term of 5 years at a monthly rental of RM100 per month. The premises in question is a controlled premises under the Control of Rent Act 1966 ("the Act"). Subsequently, the appellant, alleging 6 month's arrears of rent and non-occupation by the respondent, issued a notice to deliver vacant possession of the premises.

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The learned President held *inter alia* that the respondent had paid RM3,405 in excess of what was due to the appellant, and that the appellant, by entering into an agreement with the respondent for a larger sum than the 'fair rent', had transgressed s. 5 of the Act, resulting in the respondent enjoying the protection of the Act. Hence, this appeal by the appellant.

*e***Held:**

[1] Since the respondent's second wife is in possession of the premises (within the definition of s. 2 of the Act) she is entitled to the protection of the Act.

[2] Under the Act, the function of the Rent Officer is only advisory and the Rent Tribunal is the final authority for the purpose of defining 'fair rent' of any controlled premises.

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[3] Fair rent should be computed on the annual value and other considerations such as the location, age, character and condition of the premises.

[4] The evidence of the Assessment Officer is merely recommendatory and is not binding on either party.

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[5] The Lower Court was not in a position to arrive at a finding that the rent previously paid by the respondent to the appellant was in excess of fair rent.

[Appeal allowed.]

*h***Cases referred to:**

Sornaratnam & Anor. v. Ramalingam [1981] 1 MLJ 24

Loo Seong Thye v. Goh Teik Yah [1964] 30 MLJ 346

Shaw Brothers (K.L.) Sdn. Bhd. v. Lembaga Bandaran, Kota Bharu & Anor. [1984] 1 MLJ 276

Legislation referred to:

Control of Rent Act 1966, ss. 2, 5, 6, 7, 15, 16(1)(a), (i)

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JUDGMENT

Wan Yahya J:

The facts leading to this appeal can be briefly stated as follows. On 9 January 1968 the landlord (appellant) entered into a tenancy agreement in respect of house No. 44, Second Cross Street, Malacca with the tenant (respondent) for a term of 5 years commencing from 1 January 1968 at a monthly rental of RM100 per month. The premises in question is a controlled premises within the meaning of the Control of Rent Act 1966.

On 21 December 1972 the appellant, alleging 6 months arrears of rent and non-occupation by the respondent issued a notice to deliver vacant possession of the premises by 31 January 1973. The respondent disputes this allegation as he says that the sum total of rent paid out at RM100 per month was in excess of the RM33.25 per month fair rent payable under s. 5 of the Control of Rent Act. He therefore claimed he was never in arrears of rent. Similarly he disclaimed that he was not in occupation of the premises.

The two questions raised in this appeal implicate issues on the recovery of possession for arrears of rent under s. 16(1)(a) and non-occupation for a tenant under s. 16(1)(i) of the Control of Rent Act 1961.

The issue of occupancy is a question of fact. The learned President apparently accepted the evidence of the respondent that he used the premises for domestic and business purposes and that his second wife and her father-in-law occupied the house. A second wife of a tenant is, in my opinion, a member of his family within the meaning of s. 2 and is entitled to the protection of the Act. This issue, as mentioned earlier, is one of fact derived by the learned President who had enjoyed better advantage by having personally seen and heard the witness. I cannot see any reason for upsetting this finding. In this respect I would like to recapitulate the observation made by the Federal Court in the case of *Sornaratnam & Anor. v. Ramalingam* [1981] 1 MLJ 24 wherein it was held that the finding of fact made by a lower Court, not only in the setting of the demeanour of the witnesses whom it had the advantage of seeing and hearing but also as a matter of reasonable inference from the evidence which was common to both sides, was clearly one which no Appellate Court was entitled to overrule.

On the question of arrears of rent, the learned President approached the issue on the following rationalization. Firstly, by mere reliance on the evidence of annual value given by an Assessment Officer of the Malacca Municipality he computed the fair rent to be RM33.25 per month. As a result of this finding he arrived at a conclusion that the RM100 per month paid by the respondent to the appellant was in excess of the fair rent. All in all, he found that the respondent had paid RM3,405 in excess of what was due to the appellant. Next, he reasoned that, the appellant, by entering into an agreement with the respondent for a larger sum than the 'fair rent' had transgressed s. 5 of the Control of Rent Act which in turn had rendered the entire tenancy agreement void. The effect of this, he felt, was to make the respondent a month to month tenant enjoying the protection of the Control of Rent Act 1966.

In the course of his judgment, the learned President cited a passage from the Federal Court decision of *Loo Seong Thye v. Goh Teik Yah* [1964] 30 MLJ 346 at p. 349:

- a** It is difficult to see how rent lawfully due can be said to be in arrear in the present circumstances, when the tenant has paid specifically by way of rent more than is lawfully due.
- b** In my view the above words are intended to convey nothing more than that a tenant who had unwittingly paid sums in excess of the amount of rent lawfully due from him could not be said to be in arrears of rent when he failed to remit the rents for the months following. This is because the amounts so overpaid could be taken as set-off against the following months rent which the tenant had failed to pay. The rents lawfully due in *Loo's* case was made up partly from 'standard rent' and also from 'maximum recoverable rent' provided for under the repealed Control of Rent Ordinance, 1956. The maximum recoverable rent which corresponds to the 'fair rent' under the present Control of Rent Act 1966 was not in dispute. The Court in that case adjudicated on the amount of
- c** 'standard rent' only which they arrived at after due consideration from the maximum recoverable rent.
- The above cited case cited by the learned President therefore could be taken as an authority for the right of a tenant to set off the monthly rents which he had remitted in excess in the previous months but it is not an authority for the determination of maximum
- d** recoverable rent which is similar to our present 'fair rent'.
- Now, reverting to our present case, in order to determine whether the tenant had paid anything in excess before he stopped tendering his monthly payments the respondent has to ascertain the actual amount of 'fair rent'. The terms 'fair rent' is defined in s. 5 of the Control of Rent Act, 1966. The principle for the determination of the 'fair rent' is
- e** spelt out in s. 6 whereas the procedure to be followed is laid down in s. 7 of the said Act. The relevant sub-sections are reproduced below for easy reference:
7. (1) The landlord of any controlled premises may negotiate with his tenant with a view to determining the fair rent thereof.
- f** (2) Where such landlord and tenant at the conclusion of such negotiation come into an agreement, the fair rent so agreed upon by them shall be reduced in writing and shall be binding upon both of them.
- (3) When such landlord and tenant cannot come into an agreement within one month from the date when such negotiation began, either party may request a Rent Officer of the area where the controlled premises in question is situated to determine the fair rent thereof, and the said Rent Officer shall within one month of the date of such request
- g** determine the fair rent so requested.
- (4) The function of a Rent Officer shall be advisory only and the fair rent determined by him shall not be binding upon either party, unless accepted by both parties within one month from the date when it was determined; and every such acceptance shall be reduced in writing.
- h** (5) Where the fair rent determined by a Rent Officer under this section is not accepted by either party within one month of the date on which it was determined or where a Rent Officer is for any reason unable to determine the fair rent within one month of the date on which the request to determine the fair rent was made to him, he shall forthwith issue to both parties a certificate (in this Act referred to as "a certificate of dispute") stating that there exists in respect of the controlled premises in question a dispute between the landlord and the tenant as to the amount of fair rent thereof.
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- (6) Upon receipt of a certificate of dispute, either party may apply for the determination thereof to the Tribunal for the area where the controlled premises in question is situated; and the fair rent so determined by the Tribunal shall, unless reversed on an appeal made under the provisions of s. 15, be binding upon both parties and such fair rent shall take effect on the first day of the month following the date when application to settle the dispute was made to the Tribunal.

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It would appear from the above section that the final authority for the purpose of determining 'fair rent' of any controlled premises is the Rent Tribunal and not the Rent Officer whose function in these matters appears to be merely advisory in nature. It is not part of the Court's jurisdiction to fix it either. This perplexed point of law has been compendiously dealt with by Salleh Abas LP in the Federal Court case of *Shaw Brothers (K.L.) Sdn. Bhd. v. Lembaga Bandaran, Kota Bharu & Anor.* [1984] 1 MLJ 276 at p. 282 where His Lordship stated:

*b**c*

Under this section it is mandatory that the Landlord must only receive a fair rent for his premises. If he receives a rent in excess of the fair rent he renders himself liable to a criminal prosecution and to a civil suit for the recovery of the excess. But the fair rent under the Act is again not for the Court to fix. It is fixed by mutual agreement of the parties or in the absence of such agreement, by the Rent Officer or by the Tribunal if the fixing by the Rent Officer is not acceptable to the parties. Until this is done, notwithstanding the fact that the rent agreed to under the second lease may appear to be grossly in excess of the amount of what a fair rent should be, the Court must not exercise jurisdiction to fix what the fair rent is, as it is not its function to fix it.

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The learned Lord President went on to conclude that as the question of excess rent (sample: computable only after determination of fair rent) has not arisen, its recovery could not be claimed.

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An identical situation arises in the present case. Fair rent has not been determined by the Rent Tribunal. During the hearing an attempt was made by the respondent to assess the rent through the evidence of an Assessment Officer. In doing so both, the learned President and the Assessment Officer, overlooked the criterion as laid down in s. 6 of the Act that the determination of fair rent shall not only be computed solely on the annual value but also on various other considerations such as the location, age, character and condition of the controlled premises. Even if his mode of calculation is to be accepted by the lower Court, the rent assessed by this officer remained as a recommendatory rent which is not binding on either party. Over and above this, it would appear that it was the learned President himself and not the Assessment Officer who finally decided the quantum of fair rent in the following terms in his grounds of judgment.

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The proviso to s. 5 provides that the amount of the fair rent per *mensem* of any controlled premises shall not in any case exceed one-twelfth of the annual value of the controlled premises ...

According to DW1, an assessment officer from Melaka Municipality the annual value of the premises for 1967 and 1973 was RM399. Therefore the 'fair rent' for the premises is RM33.25 per month.

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Since the fair rent in this case has not been properly determined, the lower Court was not in a position to arrive at a finding that the rent previously paid by the respondent to the appellant was in excess of fair rent. Indeed how could a sum be said to be in excess of another when the quantity of the other sum is unknown?

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- a* The tenant's defence against the arrears of rent based on payment of excess rent and set off is not available to him. Likewise, the defence of illegality of contract and his counterclaim for repayment of excess rent must fail for the same reason.

- b* This appeal is allowed. The order of the learned President is set aside. There shall be judgment to the appellant as prayed in prayer (a), (b), (d) and (e) only of the plaintiffs amended statement of claim. The respondent shall pay the cost of this appeal and the costs of the Court below.

Also found at [1988] 1 CLJ 516

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